

Where a man charged with the offence of being in possession of uncustomed goods under the Customs Ordinance was able to show that he purchased the goods from a shop dealing in such goods, the explanation was held to be sufficient to rebut the presumption that he knew that the goods were uncustomed. In the circumstances, it was for the shop keeper to satisfy the customs authorities that duty had been paid. (See observations of Buhagiar J. in *Saminathan & Ors. v. Public Prosecutor*.⁽³⁾)

In the instant case, the appellant is the servant of a transport company. He works as an attendant of the company's lorry used for transporting goods. It is not a part of his duties to receive orders from customers or see to the loading of the goods into the lorry. It would be unreasonable to expect any driver or attendant of a transport vehicle belonging to a transport company to question the honesty of his employers every time he is asked to deliver goods to a consignee. It would be different if he was asked to transport the goods in a surreptitious manner. In the light of the facts revealed at the trial, it would appear that the managing director is the proper person who should have been charged in this case and who should have proved that he was not aware the customs duty had been paid on the goods or not. The explanation given by the appellant is, in my opinion, sufficient to show that he did not know whether duty had been paid or not.

I therefore quashed the conviction, set aside the sentence and acquitted the appellant.

Conviction quashed.

COLGATE-PALMOLIVE (ASIA) LTD. v. SWEDISH EAST ASIA CO. LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) September 30, 1966]

[Singapore — Federal Court Civil Appeal No. 57 of 1965]

Carriage of Goods by Sea — Limitation — Writ of summons taken against wrong party — Leave obtained to amend the writ — Whether mere correction of misnomer or substitution of new party.

Practice and Procedure — Misnomer — Summons taken against wrong party — Limitation — R.S.C., 1934, O. XVI rr. 11 to 13.

The applicants issued a writ against the Malaya Indonesia Line claiming damages in respect of the delivery of goods. This writ was issued within the limitation period of one year after delivery but it appeared that the writ was wrongly brought against the Malaya Indonesia Line, as they were not an entity known to the law. The correct defendants should have been the Swedish East Asia Co. Ltd. and on April 3, 1964, an order was made giving plaintiffs liberty to amend the writ and statement of claim accordingly. The defendants pleaded limitation and the High Court dismissed the application ([1965] 2 M.L.J. 176). The plaintiffs appealed.

Held: in this case it was not a question of the mere correction of a misnomer and the proceedings in this case could therefore only be said to commence on April 3, 1964, by which time the period of limitation had already expired.

Cases referred to:—

(1) *Re Nos. 55 & 57 Holmes Road, Kentish Town* [1958] 2 All E.R. 315.

(2) *Davies v. Elsby Brothers Ltd.* [1960] 3 All E.R. 672, 675.

(3) *Whittam v. W.J. Daniel & Co. Ltd.* [1961] 3 All E.R. 796.

FEDERAL COURT.

M. Karthigesu for the appellants.

A. P. Godwin for the respondents.

Cur. Adv. Vult.

Winslow J.: By a writ of summons dated 14th January, 1964 the plaintiffs/appellants claimed damages from Malaya Indonesia Line in respect of a shipment to them from New York of certain goods on a vessel named "Hermund" delivery whereof was effected at Port Swettenham on or within a few days of 15th February, 1963.

It is common ground that the carrier and the ship are discharged from all liability in respect of loss or damage to such goods unless an action is commenced within one year after such delivery. The one year limitation period, therefore, expired within a few days of 15th February, 1964, and in any event before 3rd April, 1964.

A conditional appearance was entered by Malaya Indonesia Line, the original defendants, and by Summons-in-Chambers No. 118 of 1964 dated 25th January, 1964, they applied for an order that the writ of summons be set aside for irregularity on the grounds that (a) the defendants were not an entity known to the law and (b) the notice delivered at the time of the service of the writ was bad. The application was heard by Chua J. on 21st February, 1964 and adjourned to 3rd April, 1964.

By Summons-in-Chambers No. 411 of 1964 dated 26th March, 1964, and heard on the 3rd April, 1964, the plaintiffs/appellants successfully applied to Chua J. for the substitution of "Swedish East Asia Co. Ltd." as defendants in place of "Malaya Indonesia Line", with liberty to amend the writ and statement of claim accordingly. Chua J. also ordered that service of the amended writ and statement of claim on the defendants be dispensed with.

Pursuant to a consent order made on 23rd October, 1964 a special case was stated by the parties for consideration of the following question of law, to wit, whether the plaintiffs' claim

against Swedish East Asia Co. Ltd., the present defendants, was barred by limitation for the reason that they were substituted for "Malaya Indonesia Line", the original defendants, after the expiry of the limitation period of one year.

The matter came before Ambrose J. who answered the question in the affirmative and the action was accordingly dismissed with costs.

The present appeal is against his decision.

The facts of the special case stated for consideration by Ambrose J. were as follows:—

"1. By a bill of lading numbered 1 and dated the 10th day of December, 1962 the defendants, Swedish East Asia Company Limited acknowledged the shipment by International Division Allied Chemical Corporation of 40, Rector Street, New York City on the defendants' vessel 'Hermund' at Philadelphia, of the goods therein mentioned (hereinafter referred to as 'the said goods') and agreed to deliver the same at Port Swettenham unto order of shipper. A copy of the said bill of lading is annexed hereto as Appendix 'A' and forms part of this case.

2. By clause 2 of the said bill of lading the contract of carriage evidenced thereby should have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America if the goods shipped thereunder were shipped from a port in the United States of America. The said goods were in fact shipped from a port in the United States of America. Section 3(6) of the said Act reads in part as follows:—

' In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.'

3. The said bill of lading was headed with the words 'Malaya Indonesia Line' as appears from Appendix 'A' and the plaintiffs brought this action against Malaya Indonesia Line. A conditional appearance was entered on behalf of Malaya Indonesia Line and by a Summons-in-Chambers Entered No. 118 of 1964 and dated the 25th January, 1964, an application was made on behalf of Malaya Indonesia Line for an order that the writ of summons be set aside on the grounds that (a) the defendants were not an entity known to the law and (b) the notice delivered at the time of service of the writ was bad. In support of the summons an affidavit of Antony Purdon Godwin was sworn and filed on the 25th day of January, 1964, and a copy of the said affidavit is annexed hereto as Appendix 'B' and forms part of this case. In reply to the said affidavit at Appendix 'B' an affidavit of Mootatamby Karthigesu was affirmed and filed on the 29th January 1964, and a copy of this said affidavit and the exhibits referred to therein are annexed hereto as Appendix 'C' and forms part of this case.

4. After being served with the said summons the plaintiffs filed an application by Summons-in-Chambers Entered No. 411 of 1964 and dated the 26th day of March, 1964, for an order that Swedish East Asia Company Limited be substituted as defendants in place of Malaya Indonesia Line. An order was made in terms of the said summons on the 3rd April, 1964, and a copy of the said order of court is annexed hereto as Appendix 'D' and forms part of this case.

5. The said goods were delivered at Port Swettenham on or within a few days of the 15th February, 1963, and in any event before the 2nd April, 1963. Accordingly the one year limitation period provided by the said Act had expired by the date the said order substituting

A Swedish East Asia Company Limited as defendants in place of Malaya Indonesia Line was made."

It was contended on behalf of the plaintiffs/appellants that the amendment allowed by Chua J. was the mere correction of a misnomer and the cases of: *Re Nos. 55 & 57, Holmes Road, Kentish Town*,⁽¹⁾ *Davies v. Elsby Brothers, Ltd.*⁽²⁾ and *Whittam v. W. J. Daniel & Co. Ltd.*⁽³⁾ were cited in support of this contention. I propose to set out briefly what these authorities decided.

In the first case, certain tenants issued an originating summons against Birch Bros., Ltd. as their landlords when, in fact, their landlords were Birch Bros., (Properties) Ltd. Both these companies were closely related and had the same directors, secretary and office but neither was a subsidiary of the other. It was held by Harman, J. that leave to amend the summons should not have been granted on the grounds that (i) as the tenants knew of both the two companies and that their landlords were Birch Bros., (Properties) Ltd., naming the wrong company as respondent was not a mere misnomer, and (ii) Birch Bros., (Properties) Ltd. had acquired a vested right when the time limit for bringing proceedings expired and that such vested right should not be defeated by a subsequent amendment, having particular regard to Order XVI rule 11 by which, if a party were added to an action the proceedings were deemed to have begun as against that party only when the amended process was served on it.

In the second case, the plaintiff who had been employed by a firm called Elsby Brothers until 1955 was injured in an accident in 1956 by which time the firm had been taken over by a company called Elsby Brothers, Ltd. The plaintiff's solicitors issued a writ just within the statutory period of 3 years (i.e. before the claim could become barred) against "Elsby Brothers (a firm)". After the period of limitation had expired the plaintiff's solicitors were granted leave to amend the writ by changing the name of the defendants from "Elsby Brothers (a firm)" to "Elsby Brothers, Ltd.". It was held that the amendment involved the addition of a new defendant, the limited company, and was not merely the correction of a misnomer. As Pearce L.J. said at page 675:

"The case before us is not easy, but I am persuaded that counsel for the defendants is right in arguing that the entity of the limited company is not contained on the writ, and that to add the word 'Ltd.' would be to add a new party to this action. It is not correct to say that the company has taken the place of the firm. The firm no doubt assigned its business to the company; but it co-existed with the company, as the two companies in *Re Nos. 55 & 57, Holmes Road, Kentish Town* co-existed. After the company had taken over its business the firm could have been sued in respect of an accident that happened while the firm was still carrying on the business. If one of the deciding factors be whether the defendants, on looking at the writ, must have known

that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being the two definite, separate entities, the firm and the company, it is not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company."

As Devlin L.J. said in the same case at page 675:

"For the reasons which my Lord" (meaning Pearce L.J. above) "has given, the issue in this case is simply whether or not the description of the defendants on the writ can be regarded as a mere misnomer. If it can, it can be corrected without the addition of a party: the entity remains the same. If it cannot, if it refers to an entity which is not the intended defendant, Elsby Brothers, Ltd., then the only way of putting the matter right is to substitute another entity, and, as my Lord says, that involves the addition of a defendant and, for the reasons which he has given, that cannot, in the circumstances of this case, be done. Therefore the question is: Is it a mere misnomer or is it not?"

He then proceeded to deal with the argument of counsel for the plaintiff, in the following terms, at page 676:

"It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many continental systems. In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases of misnomer — which may embrace a number of other situations apart from misnomer on a writ, for example mistake as to identity in the making of a contract. The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer. To take an example which counsel for the plaintiff put, if there had never been a firm of Elsby Brothers, if no business had been carried on before the company was formed, then it might well be that there would be no possibility of confusion: there would be only one entity which, under the description of 'Elsby Brothers', could be meant, and the description of it as a firm would be an obvious misnomer."

In the third case, the plaintiff who was employed by W. J. Daniel & Co. Ltd. suffered an accident as a result of which a writ was issued on her behalf against W. J. Daniels and Company (a firm). The firm of W. J. Daniels and Company had ceased to exist in 1919 and at the time of the writ there was no firm of that name in existence. It was held that the amendment was the correction of a mere misnomer since, in all

A the circumstances of the case, there could have been no doubt whom it was that the plaintiff intended to sue. Donovan L.J., applying the test propounded by Devlin L.J. above, held, at page 799 —

B "... there could have been no doubt in the mind of the defendants when they got the writ that it was they whom the plaintiff intended to sue and that she had simply got the name wrong."

Applying the principles established by the three cases cited above to the facts of the present case, it seems to me that there can be no question here of the mere correction of a misnomer.

C It is clear that, in deciding whether a case of misnomer has occurred in the name on the writ, the test to be applied is how would a reasonable person receiving the document take it. In the present case Messrs. Mansfield & Co. Ltd., who were the recipients of the writ, were agents of both Malaya Indonesia Line and Swedish East Asia Co. Ltd. It should also be noted that D Malaya Indonesia Line is a name under which three incorporated shipping companies, including Swedish East Asia Co. Ltd., carry on business. Applying the test of the reasonable person, what this court has to decide is whether Messrs. Mansfield & Co. Ltd., as reasonable persons, could E have been in no doubt when they received the writ that it was Swedish East Asia Co. Ltd. whom the plaintiffs intended to sue. In my opinion the answer must be in the negative.

It seems to me that the question of the exact legal status of Malaya Indonesia Line is irrelevant because Malaya Indonesia Line has an F existence of some kind which is recognised in the mercantile world in that its name figures prominently at the top of the relevant bill of lading. It is in this respect that the present case can be distinguished from the third case cited i.e. *Whittam v. W. J. Daniel & Co. Ltd.*, G *supra*. In that case, the firm which was originally sued was not in existence at all at the time of the issue of the writ and there was no entity other than W. J. Daniel & Co. Ltd. which could H possibly have been intended. In the present case Messrs. Mansfield & Co. Ltd., as reasonable persons, could not have known when they received the writ that it was Swedish East Asia Co. Ltd. and no one else whom the plaintiffs intended to sue. In my opinion they were entitled to conclude that it was Malaya Indonesia Line whom the plaintiffs actually intended to sue because the plaintiffs had already been previously informed by Messrs. Mansfield & Co. Ltd. I that the principals concerned were Swedish East Asia Co. Ltd. I do not think that as reasonable persons they would have said to themselves "Of course it means Swedish East Asia Co. Ltd. but they have got the name wrong" since there would not have been only one entity which, under the description of "Malaya Indonesia Line", could

reasonably have been meant.

It seems to me, further, that there is not even the remotest resemblance between the two names. In all the reported cases relating to misnomer there has usually been a strong resemblance between the two names with some minor variation which a court has sometimes allowed to be corrected on the ground that the old name and the new name were intended to refer to the same person. Here Malaya Indonesia Line and Swedish East Asia Co. Ltd. are two entirely different and distinct names and one is clearly not the other from any point of view.

As Ambrose J. has said in his judgment, the application of the plaintiffs/appellants by Summons-in-Chambers No. 411 of 1964 dated 26th March, 1964 was not for leave to amend the writ by changing the name of the defendants from "Malaya Indonesia Line" to "Swedish East Asia Co. Ltd.". Their application was made under Order XVI rule 12 which reads as follows:—

"Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial, by summons, or at a trial of the action in a summary manner."

The substitution of "Swedish East Asia Co. Ltd." as defendants in place of "Malaya Indonesia Line" by the order of court of 3rd April, 1964 involved the addition of "Swedish East Asia Co. Ltd." as a new party in replacement of the party that was removed.

Complaint was made before this court that there was no appeal against this order substituting "Swedish East Asia Co. Ltd." as defendants in place of "Malaya Indonesia Line." Malaya Indonesia Line, of course, need not have concerned themselves with any appeal since they had been removed as defendants. If the complaint was directed against Swedish East Asia Co. Ltd., the new defendants, the answer is that there was clearly no necessity, on the facts, for them to appeal. Their remedy, namely the right to plead with success the defence of limitation, was still open to them.

It is clear from Order XVI rule 11(4) that proceedings as against Swedish East Asia Co. Ltd. shall be deemed to have begun only on the service of the writ on them. Service of the writ on them was dispensed with. Proceedings against them can, therefore, be deemed to have been instituted, at the very earliest, only when they were made a party i.e. on 3rd April, 1964 by which time the period of limitation had already expired.

Some reliance seems to have been placed on Order XVI rule 13 for the proposition that the added or substituted defendant should be in exactly the same position as the original defendant for all purposes and that time should begin

- A to run against the plaintiff only up to the date of the original writ as against such a defendant. I do not think that Order XVI rule 13 contemplates any inroads on the law relating to limitation so as to enable a substituted defendant to be made liable as though he had been sued in the first instance within the statutory period.
- B One has only to consider the concluding words of Order XVI rule 11 to realise that this must be so because proceedings against an added party under this rule "shall be deemed to have begun only on the service on it of such writ." In other words, when a defendant is added or substituted the proceedings cannot be ante-dated as against him. He has a vested right not to be successfully sued outside the limitation period.

In conclusion, it should be observed that, from the correspondence, counsel for the plaintiffs/appellants were, in effect, informed, before the issue of the original writ, that the correct defendants should have been "Swedish East Asia Co. Ltd.". This seems to have been ignored or overlooked. Furthermore, if the bill of lading in question had been more carefully scrutinised it would have been obvious that the carrier of the goods in question was "Swedish East Asia Co. Ltd." and nobody else. On the merits it seems to me that the plaintiffs have only themselves to blame.

For all these reasons, the appeal must accordingly be dismissed with costs.

Wee Chong Jin C.J. and Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: Allen & Gledhill; Donaldson & Burkinshaw.

G **ABDUL RAHIM v. BRITISH AND MALAYA TRUSTEES LTD.**

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Chua J.)
September 30, 1966]

[Singapore — F.C. Civil Appeal No. Y9 of 1966]

H *Landlord and Tenant — Space in wall — Agreement — Whether creates licence or tenancy — Damages for overstay.*

This was an appeal from the decision of Winslow J. who held that the agreement between the parties did not create a tenancy but merely a licence for the occupation of a space between pillars in a common passage way ([1966] 2 M.L.J. 110).

I Held: (1) in determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the intention of the parties is the paramount consideration and in this case it was quite clear that what was granted to the appellant was a space in a wall for them to hang up an almeirah to display and sell their wares; this was a personal privilege and created no interest in land;

(2) damages should be awarded to the respondents